Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DEMETRIC NELSON, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ASHLEY NICOLE NELSON,

Petitioner,

versus

NOTTO & HILLIARD CONTRACTING SERVICES, INC., and McDERMOTT, INCORPORATED

Respondents.

On Petition For A Writ Of Certiorari To The Honorable Supreme Court Of The State Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a worker injured on actual navigable waters must satisfy both a status and situs requirement to be covered under the Longshore and Harbor Workers' Compensation Act ("LHWCA").

2. Whether all injuries occurring on actual navigable waters are covered by the LHWCA.

3. Whether the general maritime law preempts the application of the exclusive remedy provisions of state workers' compensation laws.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Honorable United States Court of Appeals for the First Circuit whose judgment is sought to be reviewed are:

Demetric Nelson, Petitioner
Ashley Nicole Nelson, Petitioner
Notto & Hilliard Contracting Services, Inc., Respondent
McDermott Incorporated, Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner Demetric Nelson respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered on October 27, 2000 denying his application for Writs of Certiorari and Review in the above entitled proceedings.

OPINIONS BELOW

Demetric Nelson, Individually and on Behalf of his Minor Child, Ashley Nicole Nelson v. Notto and Hilliard Contracting Services, Inc., and McDermott, Incorporated, No. 23,553, 23rd Judicial District Court, Parish of Ascension, State of Louisiana, June 22, 1998, Unpublished, reprinted in the appendix, App. 1.

Demetric Nelson, Individually and on Behalf of his Minor Child, Ashley Nicole Nelson v. Notto and Hilliard Contracting Services, Inc., and McDermott, Incorporated, State of Louisiana, Court of Appeal, First Circuit, 99/CA/0812, June 23, 2000, Unpublished, reprinted in the appendix, App. 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, § 2.

33 U.S.C. §§ 901, *et seq.*

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Louisiana denying plaintiff's application for Writs of Certiorari and Review was entered on October 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

McDermott, Incorporated (hereinafter "McDermott") is engaged in the business of constructing and refurbishing large offshore oil related structures. Existing structures capable of being recycled are removed from the seabed, transported to McDermott's fabrication yard in Louisiana for refurbishment, and then returned to sea. In 1996, Notto & Hilliard, Inc. (hereinafter "Notto") contracted with McDermott to provide skilled and unskilled labor to support the operation of McDermott's fabrication yard located adjacent to Bayou Boeuff. Petitioner Nelson was hired by Notto and assigned by McDermott to work as a welder's helper in refurbishing an offshore platform for Shell Oil. McDermott had been working on the platform in its fabrication yard over two months when Nelson began his employment.

During the first fifteen days of Nelson's assignment, the platform remained in McDermott's fabrication yard. As the refurbishment work neared completion, the massive platform was loaded onto a barge moored in Bayou Boeuff. In the days that followed Nelson continued his refurbishment work while the platform was being

secured to the barge for transport to an offshore destination. He was injured on the platform twenty-one days after it had been loaded onto the barge.

After the accident, the Louisiana Worker's Compensation Corporation ("LWCC"), insurer of both McDermott and Notto, instituted payments under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, *et seq.* However, shortly thereafter the LWCC filed a "Notice of Controversion of Right to Compensation" with the U.S. Department of Labor contesting Nelson's right to longshore benefits. The LWCC on behalf of defendants denied LHWCA coverage, claiming Nelson was limited to remedies afforded only by state law. Nelson did not contest this controversion. Accordingly, his compensation rate was reduced and the LWCC recouped overpayments under the LHWCA by claiming credits against future payments under the state Act.

In reliance on his employers' jurisdictional claims and representations, and after accepting the lower benefits provided by the state Act, Nelson filed this claim for damages against his employers Notto and McDermott under the general maritime law. The LWCC continued payments under state law until eventually deciding to terminate compensation.

At the trial of this action, Nelson claimed that: (1) he did not satisfy the status and situs test for coverage under the LHWCA, and (2) the exclusive remedy provisions of the state compensation Act did not bar his general maritime law claim against Notto or McDermott. Notto and McDermott responded by contending that while Louisiana's compensation Act governs their liability for the

payment of workers' compensation benefits, the exclusive remedy provisions of the LHWCA (33 U.S.C. § 905) provide immunity from liability under general maritime law. The state trial court accepted Respondents' internally inconsistent position, dismissing Nelson's claims. The trial court held that since the accident occurred on actual navigable waters, *Director v. Perini North River Associates*, 103 S.Ct. 634 (1983) required application of the LHWCA along with its exclusivity provisions, even in cases such as this where the status requirements of the LHWCA are not met. This finding pretermitted the necessity of addressing the conflict between the Fifth and Eleventh federal circuits on the issue of whether the general maritime law preempted the application of the exclusive remedy provisions of Louisiana's workers' compensation Act. Compare *Thibodaux v. Atlantic Richfield*, 580 F.2d 841 (5th Cir. 1978) and *King v. Universal Electric*, 799 F.2d 1073 (5th Cir. 1986) with *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990).

The Louisiana First Circuit Court of Appeal upheld the trial court, finding the facts supported coverage under the LHWCA and further finding that the defendants' contradictory positions were of no consequence. App. 2. Neither the trial court nor the court of appeal reached the issue of whether Nelson could pursue his general maritime law claims despite the Louisiana compensation Act's exclusive remedy provisions.

REASONS FOR GRANTING THE WRIT

THE LOUISIANA SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF BOTH THE FIFTH AND ELEVENTH FEDERAL CIRCUITS ON TWO SEPARATE ISSUES. FURTHER, THE DECISION OF THE LOUISIANA SUPREME COURT INVOLVES TWO IMPORTANT FEDERAL QUESTIONS WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT. LASTLY, ON *TWO* ISSUES PRESENTED FOR REVIEW, THERE IS DIRECT CONFLICT BETWEEN THE FIFTH AND ELEVENTH FEDERAL CIRCUITS.

The Louisiana courts below erroneously interpreted this Court's decision in *Director v. Perini North River Associates*, 103 S.Ct. 634 (1983). In *Perini*, this Court held that except for workers transiently or fortuitously on navigable waters, the fact that an injury occurs on actual navigable water is itself sufficient to satisfy the "status" requirement of the LHWCA. However, this Court in *Perini* reserved for another day the issue of whether a land based worker who was "transiently or fortuitously" on navigable waters when injured satisfied the "status" requirement of "maritime employment." ("We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon navigable waters." 103 S.Ct. at 651, note 34). Even though the case *sub judice* squarely presents this issue, the courts below ignored the "transient or fortuitous" exception to the *Perini* rule, completely failing to address the exception despite extensive briefing.

There is direct conflict between the Fifth U.S. Circuit and the Eleventh U.S. Circuit regarding the necessity for

a worker injured on actual navigable water to independently satisfy the "status" test of maritime employment adopted in the 1972 amendments to the LHWCA. The Fifth Circuit does not require the two-pronged status/situs test to be applied in such cases, except for workers injured while transiently or fortuitously on navigable water. *Bienvenu v. Texaco*, 164 F.3d 901 (5th Cir 1999). On the other hand, the Eleventh U.S. Circuit applied the two-pronged analysis to an actual navigable waters injury in a decision that totally ignored *Perini*. *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990). This direct conflict between federal Fifth and Eleventh Circuits remains unresolved.

After more than a quarter century since the adoption of the 1972 Amendments to the LHWCA, there remains a conflict between the circuits on the threshold issue of longshore status for workers injured on actual navigable waters. This conflict was spawned by the "transient and fortuitous" exception first recognized in *Perini*. Its resolution requires the adoption of a well-defined and viable test for coverage of injuries sustained on actual navigable waters. Such a test is found in the text of the 1972 amendments which establishes a two-pronged status/situs requirement regardless of the situs of the injury. In *Perini* this Court refused to apply the two-pronged status/situs test of the 1972 Amendments to workers injured on actual navigable waters due to a perceived inability "to find any congressional intent to withdraw coverage . . . from those workers . . . who would have been covered by the Act before 1972." 103 S.Ct. at 646. However, the text of the Amendments and the congressional

history cited by the dissent in *Perini* compel the conclusion that the status/situs test should be applied regardless of whether the injury occurs on actual navigable waters or on land. The Eleventh Circuit's *Brockington* decision adopts such an approach, judiciously avoiding a discussion of *Perini* altogether.

The "transient or fortuitous" language employed in *Perini* sets forth an imprecise standard which inevitably leads to inconsistent results. While admitting the continued viability of the "transient or fortuitous" test was not "free from doubt,"[1] the Fifth Circuit in *Bienvenu* was forced to conclude that "[T]he presence, however, of a worker injured on the water and who performs a 'not insubstantial' amount of his work on navigable waters is neither transient nor fortuitous. Though we decline to set today the exact amount of work performance on navigable waters sufficient to trigger LHWCA coverage, *instead leaving that task to the case-by-case development* for which the common law is so well-suited. . . . " 164 F.3d 901, 908 (emphasis supplied).

Under the test applied in *Brockington*, Petitioner Nelson would be deemed a land based worker covered by Louisiana's workers' compensation law. McDermott was contracted by Shell to refurbish an offshore platform

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[1] "While it is not free from doubt, we believe that the signals from the Supreme Court in *Perini* and again in *Herb's Welding* indicate that the Supreme Court would hold that a workman who is aboard a vessel simply transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under the LHWCA." 164 F.3d 901, 908.

that had been removed from its location in the Gulf of Mexico and transported to the McDermott repair facility on Bayou Boeuff. Nelson's regular employment was that of a welder's helper performing refurbishment work on land on this fixed platform. As noted by the Eleventh Circuit:

> What matters to a determination of maritime status is the description of his regular employment. . . . Brockington was employed by Certified as a land-based electrician . . . Brockington had no connection to traditional "loading and unloading" activity in the course of his employment with Certified or at any other time. There was nothing inherently maritime about his tasks as an electrician, and the "marine environment" in which he was injured had absolutely no connection to the general nature of his employment. It was merely his mode of travel to this particular jobsite. . . . His only connection with the water was the fact that he happened to be traveling over it incidental to land-based employment. Although Brockington was injured on navigable waters, he was not in any sense engaged in loading, unloading, repairing or building a vessel, and his de minimis connection to maritime activity is simply insufficient to fulfill the "status" requirement of the LHWCA. 903 F.2d 1523, 1528

If Louisiana's compensation scheme is deemed applicable to the present facts, as it should be, then another circuit conflict arises in the determination of whether Nelson is entitled to pursue a remedy under general maritime law. If Nelson is covered by the state workers' compensation law, the Fifth Circuit holds that the immunity provisions of the state Act cannot operate to deny his right to proceed against nis direct or statutory employer.

Thibodaux v. Atlantic Richfield, 580 F.2d 841 (5th Cir. 1978) and *King v. Universal Electric*, 799 F.2d 1073 (5th Cir. 1986). *Brockington* in the Eleventh Circuit holds otherwise. ("[T]he Court finds that the state has a strong interest in application of its worker's compensation law with no comparable interest to tip the balance in favor of application of general maritime law. Because Brockington has recovered under the statute, the exclusivity provision precludes any further recovery . . . " 903 F.2d 1523, 1533).

In *Thibodaux v. Atlantic Richfield*, 580 F.2d 841 (5th Cir. 1978), an oilfield maintenance and construction workman drowned in a Louisiana canal as he was being transported to work. His widow sought recovery for his death under the general maritime law against a statutory employer. The Fifth Circuit held that the exclusive remedy provisions of the Louisiana's worker's compensation statute could not operate to deprive the plaintiff of a cause of action afforded by federal maritime law. The court explained that it is "clear that an exclusive remedy provision in a state workman's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law." 580 F.2d at 846. The principles enunciated in *Thibodaux* apply with equal force to direct employees. The Fifth Circuit in *King v. Universal Electric*, 799 F.2d 1073 (5th Cir. 1986), noted that "we discern no substance in this attempted distinction" between direct and statutory employers. 799 F.2d at 1074. Thus, Notto as the direct employer and McDermott as the statutory employer are both liable in maritime tort under the analysis adopted in *Thibodaux* and *King*. In contrast, *Brockington* held that the

exclusivity provisions of Georgia's workers' compensation law prevented a land based electrician from recovering under general maritime law from his employer for injuries sustained in a boating accident on the way to a jobsite.

The Fifth Circuit in *Thibodaux* at 580 F.2d 846 noted that in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953) this Court refused to apply Pennsylvania's contributory negligence rule as a complete bar to recovery in the plaintiff's general maritime personal injury action. It quoted the following passage from the *Pope* decision: "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them." 346 U.S. at 409-410, 74 S.Ct. at 205. Absent the Louisiana compensation Act's exclusivity provisions, Petitioner would be allowed to pursue those remedies afforded by general maritime law against his employers Notto and McDermott. The State of Louisiana should not be allowed to erode the goals of uniformity expressed by this Court in the *Jensen* doctrine. ("[N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *So. Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 529 (1917)).

CONCLUSION

Petitioner's claims remain adrift upon cross currents of incongruous federal circuit jurisprudence. If the Eleventh Circuit's status/situs analysis and the Fifth Circuit's preemption analysis are deemed applicable, plaintiff is entitled to proceed under general maritime law in his action for damages against his direct and statutory employers. Conversely, if the Eleventh Circuit's preemption analysis is coupled with the Fifth Circuit status/situs analysis, plaintiff is denied recovery under the general maritime law. This Court in *Perini* cautioned that "[o]ur decision today should not be read as exempting water-based workers from the new status test." 103 S.Ct. at 651, n. 34. Ironically, *Perini* has been read as exempting *land-based* workers from the new status test. This is precisely the reading applied by the Louisiana courts below in this case, and by the Fifth Circuit in *Bienvenu*. Demetric Nelson respectfully requests that, for the reasons stated above, the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 99 CA 0812

DEMETRIC NELSON, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ASHLEY NICOLE NELSON

VERSUS

NOTTO & HILLIARD CONTRACTING SERVICES, INC., AND McDERMOTT, INC.

Judgment rendered June 23, 2000.

* * *

Appealed from the 23rd Judicial District Court
in and for the Parish of Assumption,
Louisiana Trial Court No. 23,553
Honorable Ralph Tureau, Judge

* * *

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SERVICES, INC.
and McDERMOTT, INC.

* * *

BEFORE: LEBLANC AND PETTIGREW, JJ. and KLINE,[1] J. Pro Tem.

PETTIGREW, J.

In this case, plaintiff appeals the trial court's judgment dismissing his claims against defendants on the basis that his exclusive remedy is the Longshore and Harbor Workers' Compensation Act (hereinafter referred to interchangeably as "LHWCA" or "the Act"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Demetric Nelson, was hired as a fitter's helper by Notto & Hilliard Contracting Services, Inc. in February 1996. Shortly after belong hired by Notto, Nelson was instructed to report to work for McDermott, Inc. at its fabrication yard in Amelia, Louisiana. From the date Nelson was hired through the date of his accident, Nelson worked exclusively as a fitter's helper in McDermott's Amelia yard under the direct supervision and control of McDermott through its employees.

At the time of Nelson's hire, McDermott had contracted with Shell to refurbish a fixed offshore gas platform. Nelson worked on the platform for approximately fifteen days while it was situated on land in McDermott's yard. The platform was then transferred via crane to a flat deckbarge. This "load out" process took about two days to complete. Once the platform was loaded onto the

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[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

barge, Nelson returned to the platform refurbishing job, initially helping to secure the platform on the barge. Thereafter, Nelson resumed the same duties that he had prior to the move and continued this work through the date of the accident, April 9, 1996. According to the record, Nelson was walking across the top deck of the platform to retrieve some materials needed to fill holes on the deck. Nelson was unaware that there were welding rods on the deck and "suddenly without warning slipped on the welding rods and fell into several pipes" injuring his back. On the day following the accident, Notto's workers' compensation carrier, the Louisiana Workers' Compensation Corporation (LWCC), instituted payment of LHWCA benefits to Nelson. Approximately two weeks later, LWCC filed a "Notice of Controversion of Right to Compensation" that included the following language: "THERE IS A JURISDICTION ISSUE UNDER INVESTIGATION. WE ARE CURRENTLY PAYING LONGSHORE BENEFITS. . . . " Nelson continued to receive LHWCA benefits until November 19, 1996, at which time he began receiving benefits under the Louisiana Workers' Compensation Act. Nelson's benefits were terminated effective October 31, 1997.

On October 10, 1996, prior to the conversion of his benefits from LHWCA to Louisiana workers' compensation benefits, Nelson filed the instant suit against Notto and McDermott alleging that it was a "suit on an admiralty and general maritime claim under federal law that is brought in this state court under the federal savings to suitors clause." Notto and McDermott both entered a general denial to Nelson's petition asserting that Nelson's exclusive remedy was workers' compensation benefits

under either the Louisiana Workers' Compensation Act or the LWHCA. Thereafter, Notto and McDermott moved for summary judgment on the basis that Nelson had failed to state a cause of action in admiralty. The trial court denied the motion, and the matter proceeded to a trial on the merits.

After hearing the evidence and argument presented by the parties, the court took the matter under advisement and later issued written reasons for judgment dismissing Nelson's claim with prejudice. The court found that Nelson was covered by the LHWCA and was therefore prohibited from asserting a tort action against Notto and McDermott. It is from this judgment that Nelson now appeals assigning the following specifications of error:

1. The trial court committed manifest error is [sic] applying the immunity provisions of the LHWCA and in failing to find that plaintiff could proceed against Notto and McDermott under general maritime law.

2. The trial court committed manifest error in failing to find that the actions of the defendants in terminating longshore compensation, filing a notice of controversion with the U.S. Department of Labor, and thereafter paying state compensation constituted an extrajudicial confession of jurisdictional facts.

3. The trial court committed manifest error in failing to apply the general maritime law of negligence, or in the alternative, the provision is of 33 USC Section 905(b).

4. The triail [sic] court committed manifest error in failing to find Notto and McDermott guilty of negligence.

5. The trial court committed manifest error in failing to award damages to plaintiff.

DISCUSSION

The ultimate question to be decided by this court is whether Nelson is covered under the LHWCA. On appeal, Nelson argues that his claims are covered by state compensation law and federal maritime law. In support of this contention, Nelson asserts that he relied on the defendants' "jurisdicitonal allegations" and accepted payment of Louisiana workers' compensation benefits. He further states that defendants had made a "binding election" to proceed under the state compensation law and should therefore suffer the consequences of state coverage. According to Nelson, the defendants should be "equitably estopped" from claiming the applicability of the immunity provisions of the LHWCA. In the alternative, Nelson argues that even if the LHWCA does apply to his claim, he should still be allowed to pursue a 33 U.S.C. § 905(b) claim against the defendants for vessel negligence.

In finding that Nelson was covered by the LHWCA and thus prohibited from maintaining tort action against Notto and McDermott, the trial court relied on the United States Supreme Court's holding in **Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates**, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). Having

thoroughly reviewed the record in this case, we agree with the court's conclusion that, based on the facts of the instant case, Nelson's exclusive remedy against both Notto and McDermott is compensation under the LHWCA.

Before 1972, LHWCA coverage extended only to injuries sustained on the "navigable waters of the United States (including any dry dock)." 44 Stat. 1426. Workers injured during the course of their employment upon navigable waters were covered under the LHWCA without any inquiry into what they were doing at the time of the accident. However, LHWCA benefits did not extend to any injuries occurring on land. This single-situs test governed the scope of the Act's coverage until it was amended by Congress in 1972 to extend coverage landward.

> The Act now extends coverage to more workers by replacing the single-situs requirement with a two-part situs and status standard. The newly broadened situs test provides compensation for an "employee" whose disability or death "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." § 3(a), 33 U.S.C. § 903(a). The status test defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." § 2(3), 33 U.S.C. § 902(3). To be eligible for

> compensation, a person must be an employee as defined by § 2(3) who sustains injury on the situs defined by § 3(a).

P.C. Pfeiffer Company, Inc. v. Ford, 444 U.S. 69, 73-74, 100 S.Ct. 328, 332, 62 L.Ed.2d 225 (1979).

In **Perini**, the Supreme Court was asked to decide whether the plaintiff, Raymond Churchill, a maritime construction worker who was injured while performing his job on navigable waters, and who would have been covered by the LHWCA prior to the 1972 amendments, was "engaged in maritime employment" and thus covered by the amended Act. Churchill's claims for LHWCA benefits had been administratively denied on the basis that he was not "engaged in maritime employment" under the act. On appeal, the second circuit affirmed, holding that Churchill's employment lacked a significant relationship to navigation or to commerce on navigable waters. On review of this decision, the Supreme Court reversed, concluding that Churchill was "engaged in maritime employment" for purposes of coverage under the amended Act.

> We are unable to find any congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972. As we have long held, "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 91, 98 L.Ed. 5 (1953). See also *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414, 52 S.Ct. 187, 189, 76 L.Ed.2d [sic] 366 (1932);

> *Northeast Marine Terminal Co., supra,* 432 U.S. at 268, 97 S.Ct., at 2359.

Perini, 459 U.S. at 315-16, 103 S.Ct. at 646. The Court further noted that the status requirement must still be met in order for an injured worker to qualify for coverage under the LHWCA.

> In holding that we can find no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon the actual navigable waters in the course of their employment, we emphasize that we in no way hold that Congress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the "maritime employment" language. We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.

Perini, 459 U.S. at 323-24, 103 S.Ct. 634 at 650-51 (footnotes omitted). The Court recognized, however, that the status test did not require the injured worker "to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered" under the amended Act. **Perini,** 459 U.S. at 318-19, 103 S.Ct. at 648.

Applying theses [sic] principles to the facts of the instant case, the trial court concluded that Nelson was covered under the LHWCA, and accordingly, his exclusive remedy against both Notto and McDermott was LHWCA compensation. In written reasons for judgment, the court noted:

> In the present case, Mr. Nelson was injured while performing his job on actual navigable waters. The Court, in *Perini*, did not hold that in order for a worker to be covered, he had to spend 100% of his time working on navigable waters. Instead, the Court held that because he was performing his duties on actual waters at the time of the accident, he was covered. In the present case, although Mr. Nelson did perform work on land for 3-5 weeks prior to the accident, he was performing his work on navigable waters at the time of the accident. The platform on which he was working had been attached to the deckbarge which was docked in McDermott's slip on Bayou Bouef. Once that attachment took place, Mr. Nelson ceased working on land and began working on navigable waters and continued to work on navigable waters at the time of the accident.

We have thoroughly reviewed the record in this case and find no error in this holding. The immunity provisions found in 33 U.S.C. § 905(a) are applicable to Nelson's claims and operate to prohibit him from maintaining this tort action against his employers, Notto and McDermott.

Moreover, despite Nelson's contentions to the contrary, the fact that Notto voluntarily paid LHWCA and state compensation benefits following the accident has no bearing on the outcome of this case. As set forth in La.

R.S. 23:1204, voluntary payment of compensation is encouraged by assuring the employer that his voluntary payment of benefits does not, and will not, constitute an admission of liability. La. R.S. 23:1204; **Gary v. Camden Fire Insurance Company,** 96-0055, p. 5 (La. 7/2/96), 676 So.2d 553, 556. Thus, the jurisprudence and applicable statutory law simply does not support Nelson's assertion that this voluntary payment of benefits by Notto be considered a "judicial admission" or "extrajudicial confession."

With regard to Nelson's claim that he should be allowed to maintain a vessel negligence claim against Notto and McDermott under 33 U.S.C. § 905(b), we find this argument to be unpersuasive. In written reasons for judgment, the trial court correctly noted, "Plaintiff did not assert a 'vessel negligence' claim. No evidence was offered at trial to establish who owned the deckbarge." Even assuming that Nelson had provided the court with evidence of ownership of the deckbarge, the vessel negligence claim would still be barred by the express language of 33 U.S.C. § 905(b).

In an injury to a worker covered under the Act was caused by "the negligence of a vessel, then [the worker] . . . may bring an action against such vessel as a third party" and against the vessel owner. 33 U.S.C. § 905(b); **Gay v. Barge 266,** 915 F.2d 1007, 1010 (5th Cir. 1990). However, a statutory bar is raised to the claim of vessel negligence by a worker, like Nelson, if such a person was "employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner . . . of the vessel. . . . " 33 U.S.C. § 905(b); *See* **Bush v. Eagle-Picher Industries, Inc.,** 927 F.2d 445, 449,

n.5 (9th Cir. 1991). If both conditions are met, i.e., the employer owns the vessel and the worker was employed to provide at least one of the listed services, no "action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer . . . or against the employees of the employer." 33 U.S.C. § 905(b).

In the instant case, it is undisputed that at the time of the accident, Nelson was repairing the deck of the platform that was attached to the deckbarge. As noted by the trial court, "[t]he platform became an appurtenance of the vessel upon attachment." Thus, because Nelson was engaged in ship repair as is contemplated in Section 905(b), he can have no cause of action against Notto and/or McDermott for vessel negligence.

CONCLUSION

We have conducted an exhaustive review of the record in this matter and conclude that the trial court was correct in its finding that Nelson's exclusive remedy against both Notto and McDermott is LHWCA compensation. Having determined that the trial court was correct in dismissing Nelson's claims, it is not necessary for us to address the issue of damages. The judgment below is affirmed at plaintiff-appellant's cost.

AFFIRMED.

23RD JUDICIAL DISTRICT COURT
PARISH OF ASSUMPTION
STATE OF LOUISIANA

NO. 23,553 **DIVISION "A"**

DEMETRIC NELSON, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ASHLEY NICOLE NELSON
VERSUS
NOTTO & HILLIARD CONTRACTING SERVICES, INC., AND MCDERMOTT INCORPORATED

REASONS FOR JUDGMENT

(Filed Jun 22, 1998)

This matter was tried on the 6th day of March, 1998. After hearing the evidence and considering the pleadings and memoranda filed herein, and for the written reasons which follow, this Court finds in favor of the Defendants, **Notto & Hilliard Contracting Services, Inc., ("Notto") and McDermott Incorporated ("McDermott").**

This case involves a worker who was injured on the job. Plaintiff, Demetric Nelson, filed this lawsuit against both his direct employer, Notto, and his borrowing and/or statutory employer, McDermott, to recover damages for the injuries which he sustained as result of a slip and fall at work. Mr. Nelson argues that this case falls within admiralty jurisdiction. He does not claim to be a seaman, but instead argues that the state workers' compensation exclusive remedy provisions cannot be applied because

they conflict with maritime policy and undermine substantive rights afforded by federal maritime law. Defendants deny that admiralty jurisdiction exists in this case. However, Defendants argue that even if admiralty jurisdiction does exist, plaintiff's exclusive remedy is the Longshoremen's and Harbor Workers' Compensation Act.

After considering all of the evidence and the applicable law, this Court finds that the Plaintiff, Demetric Nelson, is covered under the Longshoremen's and Harbor Workers' Compensation Act which prohibits the plaintiff from maintaining this tort action against his employers, Notto and McDermott.

Findings of Fact

On or about February 27, 1996, plaintiff, Demetric Nelson, was hired by Defendant, Notto, to work as a pipe fitter's helper. Notto had an arrangement with McDermott whereby Notto would hire people to work for McDermott. When Mr. Nelson was hired by Notto he was instructed to report to McDermott's east fabrication yard. Upon reporting to McDermott, the plaintiff was under the supervision and control of McDermott. The tools and the place of performance were furnished by McDermott. Mr. Nelson was performing the work of McDermott, and McDermott had the right to discharge Mr. Nelson at any time. Accordingly, this Court finds that McDermott was Mr. Nelson's borrowing employer.

At the time Mr. Nelson was hired, McDermott was in the process of refurbishing an offshore gas platform for

Shell. The platform was located in McDermott's east fabrication yard near Bayou Bouef. Upon completion of the refurbishing job, the platform was to be moved into the Gulf of Mexico. In anticipation of that move, the platform was transported from land onto a deckbarge which was docked in McDermott's slip on Bayou Bouef.

Prior to the platform being transported from land onto the deckbarge, Mr. Nelson had worked on the platform in McDermott's fabrication yard for approximately 3-5 weeks. Once the platform was transported onto the deckbarge, Mr. Nelson resumed with his work on the platform. On April 9, 1996, while in the course and scope of his employment, Mr. Nelson walked across the top of the platform to retrieve certain materials to assist in his duties. While walking across the top of the platform, Mr. Nelson slipped and fell on gray welding rods which were lying on the gray deck.

At the time of the accident, Mr. Nelson was performing his job on the platform which was attached to the deckbarge which was docked in McDermott's slip on Bayou Bouef. The platform became an appurtenance of the vessel upon attachment. The testimony at trial established that Bayou Bouef flows into the Gulf of Mexico. The platform was to be moved via the deckbarge from Bayou Bouef to the Gulf of Mexico. Accordingly this Court finds that Plaintiff, Demetric Nelson, was injured while working on a vessel which was docked in actual navigable waters.

LAW AND ANALYSIS

The Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, provides compensation benefits for employees who are injured upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, repairing, or building a vessel). An "employee" is defined under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, ship builder, and shipbreaker, but such term does not include a master of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." Section 2(3), 33 U.S.C. 902(3).

Prior to the 1972 amendment of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), coverage under that act extended only to injuries sustained on the actual navigable waters of the United States (including dry docks). The 1972 amendments expanded the "navigable waters" situs to include certain adjoining land areas. At the same time, the status requirement was added. "The purposes of the 1972 amendments were to raise the amount of compensation available under the LHWCA, to extend coverage of the Act to include certain contiguous land areas, to eliminate the longshoremen's strict-liability seaworthiness remedy against shipowners, to eliminate shipowner's claims for indemnification from stevedores, and to promulgate certain

administrative reforms." *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Association*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). (Emphasis by this Court).

In *Perini*, the United States Supreme Court stated the following:

> "These legislative reports indicate clearly that Congress intended to 'extend coverage to protect additional workers.' * * * Although the legislative history surrounding the addition of the status requirement is not as clear as that concerning the reasons for the extended situs, it is **clear that 'with the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate.'** * * * This necessity gave rise to the status requirement: 'The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.' *** **This comment indicates that Congress intended the status requirement to define the scope of the extended landward coverage."** (Emphasis by this Court).

The Supreme Court found that although the injured worker in *Perini* did not meet the status requirement of the LHWCA, he was covered under the LHWCA because he was injured while performing his duties on actual navigable water. The Court held that the worker was "engaged in maritime employment" for purposes of coverage under the amended LHWCA because he was

injured while working on actual navigable waters in the course of his employment, and would have been covered under the pre-1972 LHWCA. The Court reasoned as follows:

> "There is nothing in these comments, or anywhere else in the legislative reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered. In discussing the added status requirement, the Senate report states explicitly that the "maritime employment" requirement in section 3(a) was not meant 'to exclude other employees traditionally covered.' S.Rep., at 16."

In the present case, Mr. Nelson was injured while performing his job on actual navigable waters. The Court, in *Perini* did not hold that in order for a worker to be covered, he had to spend 100% of his time working on navigable waters. Instead, the Court held that because he was performing his duties on actual waters at the time of the accident, he was covered. In the present case, although Mr. Nelson did perform work on land for 3-5 weeks prior to the accident, he was performing his work on navigable waters at the time of the accident. The platform on which he was working had been attached to the deckbarge which was docked in McDermott's slip on Bayou Bouef. Once that attachment took place, Mr.

Nelson ceased working on land and began working on navigable waters and continued to work on navigable waters at the time of the accident.

Accordingly, this Court finds that Mr. Nelson is covered under the Longshoremen's and Harbor Worker's Compensation Act. As such, his exclusive remedy against both Defendants (Notto – plaintiff's direct employer, and McDermott – plaintiff's borrowing employer) is compensation under the LHWCA. (The Court notes that Plaintiff did not assert a "vessel negligence" claim. No evidence was offered at trial to establish who owned the deck-barge.) Due to the Court's findings on the classification of the plaintiff, it is not necessary for the Court to decide whether or not there is admiralty jurisdiction because such a decision would not change the outcome of this case.

Conclusion

For the foregoing reasons, this Court finds that Plaintiff, Demetric Nelson, is covered under the Longshoremen's and Harbor Workers' Compensation Act, and is therefore prohibited from asserting this tort action against the defendants in this case. Accordingly, Plaintiff's suit is dismissed with prejudice. Each party is responsible for his own costs associated with these proceedings.

SIGNED and rendered at Gonzales, Louisiana this 19th day of June, 1998.

/s/ Ralph Tureau
RALPH TUREAU, JUDGE
23RD JUDICIAL DISTRICT
COURT
DIVISION "A"

DEMETRIC NELSON, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ASHLEY NICHOLE NELSON

VERSUS

NOTTO & HILLIARD CONTRACTING SERVICES, INC., AND MCDERMOTT INCORPORATED

DOCKET NO. 23-553
23RD JUDICIAL DISTRICT COURT
PARISH OF ASSUMPTION
STATE OF LOUISIANA

JUDGMENT

Trial of this matter was held on the 6th day of March, 1998, with the Honorable Ralph Tureau presiding. Reasons for Judgment were rendered on June 19, 1998.

WHEREAS, the court finds that plaintiff, Demetric Nelson, is covered under the Longshoreman's and Harbor Workers' compensation Act, and is therefore, prohibited from asserting this tort action against the defendants in this case.

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff's suit is dismissed, with prejudice. Each part is responsible for his own costs associated with these proceedings.

THUS DONE AND SIGNED this 3 day of September, 1998, in Gonzales, Louisiana.

/s/ Ralph Tureau
Judge, 23rd Judicial District Court

SUBMITTED BY:

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The Supreme Court of the State of Louisiana

DEMETRIC NELSON, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ASHLEY NICOLE NELSON

No. 2000-C-2263

VS.

NOTTO & HILLIARD CONTRACTING SERVICES, INC. AND MCDERMOTT, INC.

IN RE: Nelson, Demetric et al; – Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Assumption, 23rd Judicial District Court Div. A, Nos. 23-553; to the Court of Appeal, First Circuit, No. 99 CA 0812

October 27, 2000

Denied.

CDK

BJJ

JPV

CDT

JTK

CALOGERO, C.J., would grant the writ.

LEMMON, J., would grant the writ.

Supreme Court of Louisiana
October 27, 2000

/s/ Rai T. Daigle
Deputy Clerk of Court
For the Court

(2)

Supreme Court, U.S.
FILED
FEB 23 2001
OFFICE OF THE CLERK

No. 00-1208

In The

Supreme Court of the United States

DEMETRIC NELSON, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ASHLEY NICOLE NELSON,

Petitioner,

versus

NOTTO & HILLIARD CONTRACTING SERVICES, INC. AND MCDERMOTT INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To The Honorable Supreme Court Of The State Of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES

33 U.S.C. 901, et seq. 3

STATEMENT OF THE CASE

Petitioners' Statement of the Case is somewhat accurate, but the undisputed, pertinent facts are few. On February 27, 1996, petitioner, Demetric Nelson, was hired by Notto & Hilliard Contracting Services, Inc. as a fitter's helper. He was immediately "loaned" to McDermott, Inc. throughout the duration of his employment until his accident on April 9, 1996. During the forty-two (42) days of his employment, petitioner performed refurbishment-type work aboard an offshore drilling rig docked in McDermott's yard. Initially, the rig was located on land; however, after fifteen (15) days, the rig was transferred via crane on to a flat deckbarge moored in McDermott's slip in navigable waters. After assisting the "load out" crew in securing the rig to the deckbarge, petitioner returned to his usual refurbishment-type duties aboard the vessel until the time of his accident.

Initially, the Louisiana Workers' Compensation Corporation ("LWCC"), as Notto & Hilliard's insurance carrier, filed a Notice of Controversion with the United States Department of Labor indicating jurisdiction was under investigation. Nevertheless, LWCC instituted benefits under the LHWCA. Shortly thereafter, petitioners filed suit against respondents claiming, among other things, that petitioner was not a covered employee under the LHWCA.

The trial court, Louisiana First Circuit Court of Appeal and the Louisiana Supreme Court all agreed with respondents in finding LHWCA coverage under *Perini*,[1]

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[1] *Director, Office of Workers' Compensation Programs v. Perini North River Association*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed. 2d 465 (1983).

since petitioner was injured on a vessel in navigation while performing his required job-tasks. Furthermore, all lower courts rejected petitioners' argument that he was "transiently or fortuitously" on the vessel at the time of his injury. It is on these issues that petitioners seek relief.

SUMMARY OF THE ARGUMENT

All lower courts held petitioner satisfied the "situs" and "status" requirements of the LHWCA, since petitioner was injured while working aboard a vessel in navigation. During at least three (3) out of the six (6) weeks of his total employment, petitioner performed 100% of his required job duties aboard a vessel in navigation. Based upon this Court's decision in *Perini, infra,* petitioner easily satisfied the situs and status requirements and therefore is covered under the LHWCA. Nor has petitioner satisfied the "transient or fortuitous" exception since petitioner was required to carry out all of his job-tasks aboard the vessel in navigation for a substantial period of time.

Finally, petitioners' have failed to show any conflict whatsoever between the Fifth and Eleventh Circuits. The *Bienvenu*[2] and *Brockington*[3] decisions are consistent on all issues with almost identical holdings. Accordingly, this Honorable Court should deny petitioners' Writ of Certiorari.

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[2] *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999).

[3] *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990).

ARGUMENT

MAY IT PLEASE THE COURT:

Assignment of Error Numbers 1 and 2: **Whether a worker injured on actual navigable waters must satisfy both a status and situs requirement to be covered under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Whether all injuries occurring on actual navigable waters are covered by the LHWCA.**

It is undisputed that petitioner was employed with defendants as a fitter's helper from February 27, 1996 through April 9, 1996, (42 days) during which time plaintiff performed refurbishment-type work aboard an offshore drilling rig docked in McDermott's yard and awaiting transport to a location in the Gulf of Mexico. During the first fifteen (15) days of plaintiff's employment, the rig was located on land in McDermott's yard. Over the next two (2) or three (3) days, the rig was transferred via crane onto a flat deckbarge moored in McDermott's slip in navigable waters. After assisting the "load out" crew in securing the rig to the deckbarge, petitioner returned to his usual refurbishment-type duties aboard the vessel for at least twenty-one (21) additional days. On April 9, 1996, petitioner slipped on a welding rod left on the rig by one of his co-workers, spawning this legal battle.

Based upon these simple, undisputed facts, all lower courts correctly limited petitioner's remedy to compensation under the LHWCA, 33 U.S.C. 901, et seq., since petitioner was injured aboard a vessel in navigable

waters while performing his normal job duties as a fitter's helper. Despite the fact that petitioner worked almost two-thirds (2/3) of his total time with respondents aboard the deckbarge moored in McDermott's slip in navigable waters, petitioner now maintains his presence aboard the vessel at the time of his injury was "transient or fortuitous" thereby excluding him from coverage under the LHWCA. Just as respondents convincingly argued to all lower courts, this Court's seminal decision in *Director, Office of Workers' Compensation Programs v. Perini North River Association*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed. 2d 465 (1983) mandates the same result – a finding that petitioner, who was injured after working almost two-thirds (2/3) of his time aboard a vessel in navigable water, is a worker covered under the LHWCA.

Prior to 1972, workers injured during the course of their employment upon navigable waters were subject to coverage under the LHWCA without any further showing; however, the LHWCA did not extend to injuries occurring on land, regardless of the workers' duties. In 1972, Congress amended the LHWCA to extend "coverage to more workers by replacing the single-situs requirement with a two-part situs and status standard." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). Based upon years of jurisprudence, led by this Court, it has been firmly established that the purpose of the 1972 amendments was to ***extend coverage landward*** and not to exclude benefits to those workers who would have been covered prior to the 1972 amendments because they were injured on navigable waters. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424, 105 S.Ct.

1421, 1428, 84 L.Ed. 2d 406 (1985); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 97 S.Ct. 2348, 2362, 53 L.Ed. 2d 320 (1977); *Pfeiffer*, 444 U.S. at 75, 100 S.Ct. at 33; *Perini*, 459 U.S. at 323-324, 103 S.Ct. at 650-651.

In *Perini*, Raymond Churchill was employed in the construction of a sewerage treatment plant extending over the Hudson River. Churchill's job was to supervise operations on a cargo barge and he was injured while standing on the deck of the barge. *Id.* at 300. This Court held that Churchill was "engaged in maritime employment" for purposes of coverage under the amended LHWCA because he was injured while working on actual navigable waters in the course of his employment, and would have been covered under the pre-1972 LHWCA. *Id.* at 324.

This Court then discussed with favor three of its pre-1972 cases to illustrate the scope of the Act's coverage prior to the amendments. *Id.* at 307-12, 103 S.Ct. at 642-45. Of significance, this Court cited with approval its prior decision in *Parker v. Motor Boat Sales*, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184 (1941). In finding that the plaintiff, Armistead, was covered under the LHWCA, this Court found that coverage would not be denied because "habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river . . . " *Id.* at 247, 62 S.Ct. at 223. Based upon the pre-1972 Act, along with well-established case law including the above, it is therefore unassailable that in the present matter, petitioner has easily satisfied the situs requirement since he was injured while carrying out his regular duties aboard a vessel in navigation.

As to the newly amended ***status*** requirement of the post-1972 LHWCA, the *Perini* Court then held:

> "In holding that we find no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon the actual navigable waters in the course of their employment, we emphasize that we in no way hold that congress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the 'maritime employment' language. ***We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA,*** providing, of course, that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, ***but because they are required to perform their employment duties upon navigable waters.***" (emphasis added).

Following this Court's holding, the Court references footnote 34, which states, in pertinent part, as follows:

> "Our holding, of course, extends only to those persons 'traditionally covered' before the 1972 amendments. We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters. Our decision today should not be read as exempting water-based

> workers from the new status test. Rather, our holding is simply a recognition that a worker's performance of his duties upon actual navigable waters is necessarily a very important factor in determining whether he is engaged in 'maritime employment.' "

Respondents respectfully contend that in addition to satisfying the situs requirement, petitioners have easily satisfied the status requirement as set forth in *Perini*. Petitioner's job required that he work more than three (3) weeks aboard a rig attached to a vessel in navigation. This amounts to almost two-thirds (2/3) of the entire time he worked for respondents. Because he was ***required to perform his duties on a vessel in navigation***, petitioner satisfies the status requirement as defined by this Court. Since situs and status are both satisfied, petitioner is covered under the LHWCA.

Respondents further contend the lower courts considered, and rightfully rejected petitioner's argument that his time spent aboard the deckbarge was "transient or fortuitous" as mentioned in footnote 34 above. To date, this Court has left to the lower courts the task of defining and refining workable definitions of the terms "transient or fortuitous." Recently, our learned judges in the fifth circuit, a circuit well acquainted with maritime and LHWCA issues, had the opportunity to provide some salient guidance on this issue in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999).

The *Bienvenu* court, sitting en banc, followed *Perini's* mandate in holding that a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test where his

presence on the water at the time of his injury was neither transient nor fortuitous. *Id.* at 908. Of significance, the court found the plaintiff in *Bienvenu* spent approximately 8.3 percent of his work time actually performing job responsibilities on navigable water. While the *Bienvenu* court technically declined the opportunity to define the terms "transient or fortuitous" in this context, the court held that a worker injured on the water who performs a "not insubstantial" amount of his work on navigable waters is covered under the LHWCA. *Id.* The court also offered the following guidance:

> "First, the threshold amount must be greater than a modicum of activity in order to preclude coverage to those employees who are merely commuting from shore to work by boat. Also, the routine activity of assisting in tying the vessel to the dock and loading or unloading one's tools and personal gear onto the vessel do not count as meaningful job responsibilities. Moreover, we agree with the Supreme Court in *Herb's Welding* that there is a substantial difference between a worker 'performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land based but who takes a boat to work.' (Citations omitted). The time *Bienvenu* actually worked on production equipment aboard the MISS JACKIE constituted 8.3 percent of his time at work. This is not an insubstantial amount of *Bienvenu's* work time and is sufficient to trigger LHWCA coverage." *Id.*

The holding in *Bienvenu* is consistent with a plethora of other Fifth Circuit decisions deciding the issue of jurisdiction under *Perini*. See *Fontenot v. AWI, Inc.*, 923

F.2d 1127 (5th Cir. 1991); *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987); *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264 (5th Cir. 1986); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986); *Thornton v. Brown & Root, Inc.*, 707 F.2d 149 (5th Cir. 1983).

Respondents respectfully submit the petitioner has easily satisfied *Bienvenu's* "not insubstantial" test since petitioner was required to perform 100 % of his duties on a vessel in navigation over a substantial period of time. For more than three (3) weeks, petitioner performed all of his work-tasks aboard a vessel in navigation. Based upon these undisputed facts, it is now ludicrous to suggest that petitioner's presence aboard the vessel at the time of his accident was transient or fortuitous.

Based upon the overwhelming statutory and case law in support of respondents' position, it is no wonder petitioners' have failed to cite a single case in support of their position that petitioner's work aboard the deckbarge in navigation was transient or fortuitous. Petitioners instead attempt to concoct a split in the Federal Fifth and Eleventh Circuits by arguing the *Bienvenu* decision conflicts with the eleventh circuit's decision in *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990); *writ denied.* Respondents submit a cursory review of the facts in *Brockington* proves that no such conflict exists.

In *Brockington*, the court framed the issue: "whether, at the time of his injury, Brockington was engaged in maritime employment sufficient to fulfill the 'status' requirement." *Id.* at 1528. The plaintiff in *Brockington* was employed as a land-based journeyman electrician for

more than ten (10) years with his employer, Certified. His duties primarily consisted of wiring houses and commercial and industrial buildings. He also dug ditches, ran conduit, pulled cable and wired electrical fixtures. On the job of injury, Certified had contracted with the University of Georgia to do wiring work at a marine laboratory being built on Sapelo Island off the coast of Georgia. The lab was being built entirely upon land. Because there was no bridge to the island, workers were required to travel to the island aboard the "Sapelo Queen" ferry. Due to difficulties with the ferry schedules, plaintiff and a co-worker obtained permission to use a sixteen (16) foot motorboat to travel to and from the island. On his first trip to the island in the motorboat, plaintiff was injured. Not surprisingly, the eleventh circuit summarily rejected plaintiff's claims of status under the LHWCA, and instead held:

> "The undisputed facts indicate that Brockington was employed by Certified as a land-based electrician. His duties consisted primarily of wiring houses and commercial buildings. Brockington had no connection to traditional "loading and unloading" activity in the course of his employment with Certified or at any other time. There was nothing inherently maritime about his tasks as an electrician, and the "marine environment" in which he was injured had absolutely no connection to the general nature of his employment. It was merely his mode of travel to this particular jobsite. Furthermore, it cannot even be said that Brockington regularly traveled over water to more than two jobsites in the ten years he was employed by Certified. His only connection with the water was the fact that he happened to

> be traveling over it incidental to land-based employment.
>
> Although Brockington was injured on navigable waters, he was not in any sense engaged in loading, unloading, repairing or building a vessel, and his de minimis connection to maritime activity is simply insufficient to fulfill the "status" requirement of the LHWCA. Consequently, Certified's motion for summary judgment on plaintiffs' claim under the LHWCA will be granted."

The *Brockington* court reached the proper decision in finding the plaintiff failed to establish the "status" requirement under the LHWCA ***since plaintiff was injured while transiently or fortuitously upon navigable waters.*** Without question, the Fifth Circuit, relying upon *Bienvenu, Perini* and *Herb's Welding,* would reach the identical holding as the *Brockington* court because the facts clearly establish a true example of the "transient or fortuitous" exception to *Perini* and the Act. In fact, the very holding in *Bienvenu,* citing *Herb's Welding,* refers to the exact factual scenario as in *Brockington,* where a land based worker is injured while taking "a boat to work." Finally, although petitioners argue the *Bienvenu* and *Brockington* cases, and thus the circuit law is in conflict, our fifth circuit judges obviously believe these cases were founded on consistent holdings when the court, in *Bienvenu,* stated, "[w]e join the Eleventh Circuit in reaching this conclusion," referring then to the *Brockington* decision.

CONCLUSION

The undisputed facts and the overwhelming case law support the lower courts' decisions in favor of respondents. Since petitioners have satisfied the situs and status requirements of the LHWCA, this Court should deny petitioners' application for writs of certiorari.

Respectfully submitted,

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